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No. 91-643

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

DORETHA BRYANT

Petitioner,

vs.

BROOKLYN BARBECUE CORPORATION, et al.

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The following questions, rather than those questions identified by Petitioner, would be presented for review in this case:

1. Whether the District Court committed an abuse of discretion when it imposed sanctions against Petitioner's counsel pursuant to Rule 11, Federal Rules of Civil Procedure, based upon its conclusion formed by counsel's admissions that he failed to conduct a reasonable inquiry of the facts and law prior to filing the original Complaint and that he filed the original Complaint for an improper purpose, namely, to coincide with the unrelated criminal sentencing of one of the named Respondents?

2. Whether the District Court committed error in imposing sanctions, pursuant to Rule 11, Federal Rules of Civil Procedure, despite lack of service of the original Complaint and Summons upon any of the Respondents?

3. Whether the District Court committed error in awarding sanctions, pursuant to Rule 11, Federal Rules of Civil Procedure, to Respondents' respective counsel?

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PERCEIVED MISSTATEMENTS OF FACT AND CASE

1. The third of Petitioner's "Questions Presented For Review" misstates one of the bases for the District Court's imposition of Rule 11 sanctions. While Respondents' Motion to Dismiss requested sanctions be imposed due to Petitioner's failure to comply with the 120 day service requirement of Rule 4(j), the District Court's imposition of sanctions was based upon judicial admissions by the Petitioner's counsel (contained in a responsive pleading to the Motion to Dismiss) that (a) he had not conducted a reasonable inquiry of law and fact prior to filing the original Complaint *and* (b) that the original Complaint had been filed to coincide with the unrelated criminal sentencing of one of the Respondents. Thus, the District Court concluded the original Complaint had been filed both without prior reasonable inquiry and for an improper purpose, namely to attract publicity and to harass the Respondents. (A copy of the March 14, 1990 Order of The Honorable Joseph E. Stevens, Jr., United States District Judge for the Western District of Missouri is appended to Petitioner's Petition for Writ of Certiorari ("Petition") at Appendix D. A copy of the May 15, 1990 Order itemizing the sanction award is appended here as Appendix 1.)

2. The fourth of Petitioner's "Questions Presented For Review" is inappropriate for consideration in this Petition as it refers only to the propriety of the District Court's dismissal of the original Complaint as a basis for the imposition of sanctions. This proposition misstates the District Court's basis for imposing sanctions. Further, Petitioner did not preserve this issue on appeal to the United States Court of Appeals for the Eighth Circuit. In

fact, the Eighth Circuit noted in its April 29, 1991 opinion that Petitioner did not challenge the dismissal of the action on appeal. (A copy of the April 29, 1991 opinion of the United States Court of Appeals for the Eighth Circuit is appended to Petitioner's Petition at Appendix B.)

3. Petitioner's reference to the Orders of the District Court indicates that the same were entered "without the benefit of any kind of hearing, at any time, on any subject". This reference infers that a hearing was requested. At no time did Petitioner nor Petitioner's counsel ever request such a hearing. To indicate otherwise is to mislead this Court.

REASONS FOR DENYING THE WRIT

I. There Are No Important Issues Of Federal Law Unresolved And There Is No Basis For *Certiorari* Under The Applicable Clearly Erroneous/Abuse Of Discretion Standard Of Review.

Petitioner asserts *certiorari* review is warranted based upon the opinion of *"Donald J. Willy, Petitioner v. Coastal Corporation, et al.*, No. 90-1150, 501, U.S. ___, 115 L.Ed 2d 994 (August 1991)"[1] and pursuant to Rule 10.1(c), Supreme Court Rules. Respondents maintain, as more fully discussed below, no such basis for *certiorari* review exists. Further, Respondents have reframed the "Questions Presented For Review" to clarify for this Court the

[1] As cited by Petitioner in her Petition.

issues which were properly decided by the District Court and affirmed by the Eighth Circuit Court of Appeals.

Notwithstanding Petitioner's creative statement of "Questions Presented for Review", the actual questions on appeal are alarmingly simply: (1) whether the District Court abused its discretion in awarding Rule 11 sanctions after concluding that Petitioner's counsel failed to conduct a reasonable inquiry prior to filing the original Complaint and that such filing occurred for an improper purpose; and (2) whether the District Court's award of Rule 11 sanctions to Respondents' respective counsel, despite lack of service of the original Complaint and Summons, was clearly erroneous.

The District Court imposed Rule 11 sanctions against Petitioner's counsel because he effectively admitted that he had not conducted the "reasonable inquiry" required by Rule 11 before the original Complaint was filed and further admitted that the original Complaint had been filed to coincide with the criminal sentencing of one of the Respondents, which was an improper purpose. (Petitioner's Appendix B3.) (A copy of the admissions of Petitioner's counsel contained in the pleading entitled "Plaintiff's Suggestions in Opposition to Motions to Dismiss; and Motion for Leave to File And Serve First Amended Complaint", filed with the District Court on December 13, 1989 ("Suggestions") is appended hereto at Appendix 2.) The Eighth Circuit correctly identified that the sole issue for consideration on appeal was the District Court's imposition of Rule 11 sanctions. The Eighth Circuit further clarified that the Petitioner did not challenge the dismissal of the action (based upon failure to comply

with the 120 day service requirement set forth in Rule 4(j), Federal Rules of Civil Procedure) in the appeal. (Petitioner's Appendix B3.)

A. Failure To Comply With Rule 14(e) And Deficiencies Of The Petition

As a preliminary matter, Respondents note that Petitioner fails to comply with the requirements of Rule 14(e), Supreme Court Rules, in that she makes no concise statement in her Petition as to the grounds on which the Jurisdiction of this Court is invoked for consideration governing review on writ of *certiorari*, namely those grounds set forth in Rule 10, Supreme Court Rules. Neither could such a representation be made in good faith as the Court of Appeals did not address or resolve an important question of federal law nor did it decide a federal question in conflict with decisions of this Court.

Additional deficiencies of the Petition are further noted: Petitioner's first two "Questions Presented for Review" relate to issues recently resolved by this Court. The third of those Questions is a misstatement of the District Court's basis for imposing Rule 11 sanctions. Petitioner is estopped from presenting the fourth of the Questions as she failed to preserve such issue on appeal to the Eighth Circuit. Further, Petitioner's citation to three opinions of this Court as reasons for granting the writ under Rule 10, Supreme Court Rules, incorrectly summarizes the questions of federal law decided therein.

The Petition attempts to make this case into something that it is not, rather than presenting the case for what it is: an attempt at a second appeal raising the issues

of whether the District Court's findings that the original Complaint was filed for an improper purpose and filed without reasonable pre-filing inquiry into the law and facts were an abuse of discretion and whether its award of Rule 11 sanctions was clearly erroneous. Petitioner has had her appeal; the presentation of this case to this Court as one for which *certiorari* should issue is inappropriate and ill serves the Petitioner and this Court.

B. Standard Of Review Of A District Court's Imposition Of Rule 11 Sanctions

The authority of a District Court to impose Rule 11 sanctions of attorneys' fees, incurred in defense of an action filed without a prior reasonable inquiry as to law and fact or for an improper purpose, is well established in law. *Balfour Guthrie, Inc. v. Hunter Marine Transport, Inc.*, 118 F.R.D. 66, 74 (M.D. Tenn. 1987). *See also Barlow v. McLeod*, 666 F.Supp. 222 (D. D.C. 1986); *Saine v. A.I.A., Inc.*, 582 F.Supp. 1299 (D. Colo. 1985). Rule 11 states, in part, "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, *shall* impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . ". [Emphasis added.]

In *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. ___, 110 S.Ct. 2447, 2459 (1990), this Court applied the clearly erroneous/abuse of discretion standard of review to a Rule 11 award, stating "[f]amiliar with the issues and litigants, the District Court is better situated than the court of appeals to marshall the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11".

The Court further stated "[i]n practice, the 'clearly erroneous' standard required the appellate court to uphold any District Court determination that falls within a broad range of permissible conclusions". *Id.* at 2458 (citing *Anderson v. Bessemer City,* 470 U.S. 564, 573-74 (1985)) ("If the District Court's account of the evidence is plausible in light of the record reviewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous".). This same deferential standard must apply to the review of an award of Rule 11 sanctions based upon the Petitioner's counsel's filing of the original Complaint for an improper purpose and without conducting a reasonable inquiry into the law and facts prior to filing.

In the present case, the Eighth Circuit needed no such deferential standard to affirm the Rule 11 sanctions award. The Court held that there was no abuse of discretion by the District Court and affirmed that court's conclusion "from the papers counsel had filed . . . that counsel knew he had not conducted a reasonable inquiry of the facts and the law prior to filing the original Complaint, but filed it prematurely so as to benefit from the publicity generated by [Respondent] Preston Kerr's criminal sentencing on charges relating to bank fraud" thus, affirming the imposition of Rule 11 sanctions. (Petitioner's Appendix B4.)

C. *Willy* Does Not Support the Granting Of *Certiorari*

In her Petitioner, Petitioner represents to this Court this *certiorari* should be granted in this case for the same reasons it was granted in "*Donald J. Willy, Petitioner v. Coastal Corporation, et al.*, No. 90-1150, 501, U.S. ___, 115 L.Ed. 2d 994 (August 1991)" (case below cited at 915 F.2d 965 (5th Cir. 1990)). In fact, *Willy* has a much more detailed history than that cited in Petitioner's Petition. In sum, however, *Willy* affirms the proposition that is set forth in the seminal case on Rule 11 sanctions, *Cooter & Gell v. Hartmarx Corp., supra*, that being that Rule 11 sanctions are available even when the District Court that imposed them was without subject matter jurisdiction. *Willy*, 915 F.2d at 967.

In *Willy*, Willy moved to remand an action which had been removed to federal court by the defendant based upon federal question jurisdiction. In response to the defendant's Rule 12(b)(6) motion to dismiss, Willy filed a 110-page motion for summary judgment and submitted "1200 pages of unindexed, unorganized supporting material". *Willy*, 915 F.2d at 966. After two separate hearings, the District Court granted the defendant's motion to dismiss and motion for Rule 11 sanctions against Willy and his attorney.[2] The sanctions were imposed for the "filing

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[2] In her Petition, Petitioner misquotes the opinion in *Willy* which may give this Court the illusion that two separate evidentiary hearings were held on the Rule 11 sanctions issue before sanctions were imposed against Willy and his attorney. There is nothing in the reported opinion which supports such an illusion.

of misleading and ill founded pleadings, the use of the discovery process to harass opposing parties, repeated references to non-existent allegations of conflicts of interest, and the filing of the infamous 110-page summary judgment motion accompanied by reams of irrelevant and unorganized material". *Willy*, 915 F.2d at 966, n.3.

Petitioner asserts that because this Court granted *certiorari* in part in *Willy*, *certiorari* should be granted here. Fault with this assertion is two-fold: 1) the instant case and *Willy* are factually distinguishable, and 2) the basis for which *certiorari* was granted in part in *Willy* is unreported and therefore, cannot be relied upon by Petitioner.

D. Eighth Circuit's Opinion Does Not Conflict With Applicable Decisions Of This Court

After referencing *Willy* as grounds for *certiorari* review, Petitioner then cites to three decisions of this Court which she maintains are in conflict with the Eighth Circuit's affirmation of the District Court's ruling mandate the *certiorari* review of the Eighth Circuit's opinion under Rule 10, Supreme Court Rules. Reliance on any one of these three decisions is misplaced.

In referencing the two opinions of *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. ___, 111 S. Ct. 922 (1991) and *Chambers v. NASCO, Inc.*, 501 U.S. ___, 111 S.Ct. 2123, (1991). Petitioner continues to misstate the basis for the District Court's imposition of Rule 11 sanctions. The District Court did not conclude that the original Complaint was filed for an "improper purpose" based upon Petitioner's attorney's failure to

serve the pleading within 120 days after filing nor did it make an independent determination from a review of the pleading that it was not "well founded" and "baseless". Instead, the District Court concluded an "improper purpose" existed for filing based upon the admissions of Petitioner's counsel contained in the Suggestions.[3] Though "improper purpose" for purposes of Rule 11 sanctions involves an objective standard, *Equal Employment Opportunity Commission v. Milavetz and Associates, P.A.*, 863 F.2d 613, 615 (8th Cir. 1988), "it is appropriate to consider the signer's subjective beliefs to determine the signer's purpose in filing suit, if such beliefs are revealed through an admission that signer knew that the motion or pleading was baseless but filed it nonetheless. This evidence may be said to be "objective" in the sense that it can be viewed by a court without fear of misinterpretation; it does not involve difficult determinations of credibility". *In re Kunstler,* 914 F.2d 505, 519 (4th Cir. 1990).

Petitioner's representations as to the third decision, *Pavelic & LeFlore v. Marvel Entertainment Group,* 493 U.S. ___, 110 S.Ct. 459 (1989), is shocking as the opinion does not even *remotely* pertain to the proposition assigned to it by Petitioner in her Petition. *Pavelic* determined that Rule 11 did not authorize a District Court to impose a sanction against the law firm of the individual attorney who signed the pleading as the rule connotes sanctions only

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[3] Admissions made in pleadings during the course of a case are judicial admissions binding on the party making them. *Seven-Up Bottling Co. v. Seven-Up Co.*, 420 F. Supp. 1246, 1251 (E.D. Mo. 1976), *aff'd*, 561 F.2d 1275 (8th Cir. 1977).

against the individual signer and not the juridical person on whose behalf the paper was signed. *Pavelic, id.*, at 445.

As such, Petitioner provides no basis for the granting of *certiorari* under the clearly erroneous/abuse of discretion standard of review or under Rule 10, Supreme Court Rules. Even if *certiorari* were granted, as discussed below, there is no argument to be made to reverse the Eighth Circuit's affirmation of the District Court's ruling. The District Court's ruling and the Eighth Circuit's affirmation of that ruling are clearly in accord with the applicable decisions of this Court.

II. The District Court's Imposition of Sanctions Fully Satisfied the Requirement of Rule 11 and Does Not Constitute An Abuse of Discretion.

Rule 11, Federal Rules of Civil Procedure, provides in relevant part that the attorney's signature on any pleading certifies

> that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law, and that it is not interposed for any improper purposes, such as to harass or cause unnecessary delay or needless increase in the cost of litigation.

Rule 11 requires more of counsel than regurgitating the allegations of a client. A plaintiff's counsel has both an ethical and a statutory obligation not to accept the client's version of the facts alone. *See Nassau-Suffolk Ice*

Cream, Inc. v. Integrated Resources, Inc., 114 F.R.D. 684, 689, 690-91 (S.D. N.Y. 1987); *Fleming Sales Co., Inc. v. Bailey*, 611 F.Supp. 507, 519 (N.D. Ill. 1985). Since Petitioner's counsel admits he had not sufficiently investigated the RICO claim prior to filing the original Complaint, he could only have relied upon the information provided by the client to substantiate Petitioner's claims.

Further, since Petitioner's counsel, by his own admissions, did not possess the numerous documents regarding his client's alleged claims prior to filing the original Complaint, Petitioner's counsel did not have sufficient facts to guide his legal research. A complaint "woefully lacking in details", and consisting "almost entirely of conclusory allegations", "implicat[ing] anyone even tangentially related to the transactions", and with "mere blanket references to defendants and no specifics" as to particular defendants earns Rule 11 sanctions. *See Barlow v. McLeod, supra.*

The District Court noted in its March 14, 1990 Order, that "[i]n determining whether an award of sanctions is appropriate . . . [a] court must consider whether the person who signed the pleading conducted a reasonable inquiry into the facts and law supporting the pleading", citing to *Naylor v. Lee's Summit Reorganized School District R-7*, 703 F.Supp. 803, 820 (W.D. Mo. 1989). The District Court further noted that since Rule 11 requires the individual signing the document to conduct a reasonable inquiry, a party filing a complaint hoping that discovery will reveal facts supporting the allegations may be sanctioned, citing to *Balfour Guthrie, Inc., supra* at 74, and *Nassau-Suffolk Ice Cream, Inc., supra* at 689.

Another requirement imposed by Rule 11 upon the signer of a pleading is that the pleading not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needlessly increase the cost of litigation". The District Court found that Petitioner's counsel, again by his own admissions, filed this action for an improper purpose, specifically, that "[t]he Complaint herein was filed to coincide with the sentencing of . . . [respondent] Preston Kerr". (Petitioner's Appendix D4.)

Petitioner attempts to shift this Court's attention from the actual basis for the District Court's conclusion that the original Complaint was filed with an "improper purpose" to an unfounded basis. Petitioner asserts that the District Court concluded that the filing occurred for an improper purpose due to Petitioner's counsel's failure to serve the original Complaint within 120 days of filing, as set forth in Rule 4(j), Federal Rules of Civil Procedure; Petitioner's counsel claims ignorance of Rule 4(j). Petitioner's counsel argues that ignorance of a procedural requirement should not be a sanctionable event.

At no time before the District Court did Petitioner's counsel advise the Court or Respondents that he was unaware of the 120 day service requirement. Nowhere in the briefs filed with the Eighth Circuit did Petitioner's counsel confess his ignorance of Rule 4(j). The first time Petitioner's counsel brought this statement to light was during oral argument before the Eight Circuit. Not only was it inappropriate to do so then, but it is also inappropriate now.

In making its conclusion concerning whether or not an "improper purpose" existed, the District Court did not consider Petitioner's counsel's ignorance of Rule 4(j). This is evident in that the District Court's opinion clearly identifies the "imporper purpose" as the filing of the original Complaint to coincide with the sentencing of one of the [Respondents]. (Petitioner's Appendix D10.)

Thus, Petitioner's counsel's ignorance of Rule 4(j) is not only untimely but also irrelevant as the same is *not* the basis for the District Court's conclusion of the existence of an "improper purpose".

Petitioner asserts that the District Court failed to investigate Petitioner's counsel's "reasonable inquiry" prior to filing or to assess the signer's credibility. However, Petitioner's counsel's judicial admissions vitiated any requirement of the District Court to conduct such an investigation. *See In re Kunstler, supra.* Such admissions, which the District Court viewed without fear of misinterpretation, handed the Court its basis for imposing Rule 11 sanctions. Petitioner's counsel can look to no one but himself for the action of the District Court.

Along these lines, Petitioner argues that the District Court did not afford him notice prior to imposing Rule 11 sanction. There is no basis for this argument.

Federal Rule of Civil Procedure 11 does not require an evidentiary hearing prior to the imposition of sanctions upon counsel. *Oliveri v. Thompson,* 803 F.2d 1265, 1280 (2d Cir. 1986). Due process of law requires only notice and an opportunity to be heard. *Donaldson v. Clark,* 819 F.2d 1551, 1559-1580 (11th Cir. 1987); *INVST Financial Group, Inc. v. Chem-Nuclear Systems, Inc.,* 815 F.2d 391, 405

(6th Cir. 1987); *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2d Cir. 1986); *Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194, 205-06 (7th Cir. 1985). When a counsel has full opportunity to brief and to respond to the request for Rule 11 sanctions, counsel has been afforded due process. *Brown v. National Board of Medical Examiners*, 800 F.2d 168 (7th Cir. 1986).

Notice was given to Petitioner's counsel in two ways. First, Rule 11, in and of itself, constitutes notice that sanctions could be imposed. *See Donaldson*, 819 F.2d at 1560. Second, Respondents' motions to dismiss, filed on November 29, 1989, contained Respondents' first request for imposition of Rule 11 sanctions. Either of these notices is sufficient. *Id.*

Petitioner's counsel was given an opportunity to be heard *before* and *after* the court notified him of its intent to impose sanctions.[4] In *Brown v. National Board of Medical Examiners, supra at* 173, "[T]he district court after imposing sanctions on [Appellant's counsel] allowed [counsel] to respond and subsequently entertained a reconsideration motion accompanied by full briefing on both sides." The *Brown* court held such procedure was adequate due process. Such procedure occurred in this case as well.

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[4] Before the District Court entered the initial Order imposing sanctions on March 14, 1990, Petitioner's counsel filed the Suggestions (Respondents' Appendix 2) and a pleading entitled "Plaintiff's Supplemental Suggestions in Opposition to Omnibus Motions to Dismiss, Quash, Strike and For Sanctions", which was filed with the District Court on January 19, 1990.

(Continued on following page)

Judge Stevens was fully aware of all facts relevant to the Rule 11 sanctions. The number of pleadings and orders filed and entered in this case at the District Court level indicates that Judge Stevens spent considerable and valuable judicial resources and time participating in the proceedings. Furthermore, Judge Stevens determined and set forth the specific grounds upon which he was relying in imposing the Rule 11 sanctions, which further establishes that Petitioner's counsel was afforded due process (*see, e.g.*, Petitioner's Appendix D and Respondents' Appendix 1). *See Tom Growney Equipment, Inc. v. Shelley Irrigation Development, Inc.*, 834 F.2d 833 (9th Cir. 1987); *Oliveri v. Thomson*, 803 F.2d 1280 (2d Cir. 1986). Finally, the admissions made in the Suggestions obviated any need for an evidentiary hearing. *Seven-Up Bottling Co. v. Seven-Up Co., supra* at 1251. These admissions are not only conclusive, they are dispositive of the court's authority to order sanctions. *See In re Kunstler, supra.*

Thus, the District Court properly concluded that sanctions were appropriate (and the Eighth Circuit

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Petitioner's counsel responded three times in writing after the District Court entered its initial sanction Order on March 14, 1990, to wit: (i) a response (as directed by the District Court); (ii) a supplemental response; and (iii) a motion to alter or amend the order entered by the District Court that ruled upon Petitioner's responses to the order imposing sanctions.

Despite having filed these pleadings, Petitioner's counsel *never* requested a hearing on any of Respondents' Motions for Sanctions.

affirmed) because Petitioner's counsel effectively admitted that the original Complaint was filed without the "reasonable inquiry" required of Petitioner's counsel by Rule 11 and for an improper purpose, namely to attract publicity and to harass the Respondents. The Eighth Circuit clearly determined the District Court's conclusion fell within the broad range of permissible conclusions, that no discretion was abused, that sanctions were appropriate and as such, had no basis for reversal.

III. The District Court Properly Interpreted Rule 11 When It Imposed Sanctions Against Petitioner's Counsel, Despite The Lack Of Service Of The Original Complaint And Summons Upon Any Of The Respondents, And When It Awarded Such Sanctions Directly To Respective Counsel For Respondents, As Opposed To Respondents.

Petitioner's assertion that Rule 11 sanctions may not be imposed since Respondents had not been served is summarily dismissed by this Court's opinion in *Cooter, supra,* as well as district court opinion in *Stinson v. American Sterilizer Co.*, 127 F.R.D. 689 (M.D. Ala. 1989), which is virtually "on all fours" with the present case. A District Court's jurisdiction to impose Rule 11 sanctions in invoked by the *filing* of the underlying complaint as violations of Rule 11 are complete when the paper is filed. *Cooter, supra,* 110 S.Ct. at 2456 (citing *Szabo Food Services, Inc. v. Canteen Corp.*, 823 F.2d 1073 (7th Cir. 1987)), *cert. dismissed,* 485 U.S. 901 (1988).

The power of a District Court to impose sanctions is not dependent upon service upon a defendant. While

jurisdiction is obviously a prerequisite to entering judgment, the court's power to impose Rule 11 sanctions does not depend upon either in personam or subject matter jurisdiction. The powers inherent in Rule 11 are discussed in *Wojan v. General Motors Corp.*, 851 F.2d 969 (7th Cir. 1988), wherein the court states:

> Recently, we observed that " '[j]urisdiction' is an all-purpose word denoting adjudicatory power. A court may have power to do some things but not others, and the use of 'lack of jurisdiction' to describe the things it may not do does not mean that the court is out of business". *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987). In *Szabo*, we held that not only does a court have the adjudicatory power to impose sanctions under Rule 11 after a Fed.R.Civ.P. 41(a)(1)(i) dismissal, but also regardless of whether a court actually has subject matter jurisdiction (either diversity or federal question), the court retains the power to consider a Rule 11 motion. *Id.* at 1078. This conclusion is founded upon the inherent authority of a court "to determine its jurisdiction and [to] engage in all the usual judicial acts [including imposing Rule 11 sanctions], even though it has no power to decide the case on the merits". *Id.* Our observation in *Szabo* that District Courts possess inherent power over Rule 11 motions even under circumstances where jurisdiction over the underlying case is absent is consistent with the now well-established rule that the "inherent powers of federal courts are those which 'are necessary to the exercise of all others.' "

Petitioner's adoption of a restrictive view of the word "parties" as used in Rule 11 (such that only parties [those who have been served] are entitled to recover attorneys' fees) flies in the face of the policy set forth in *Szabo, Cooter* and *Willy*. The central purpose served by Rule 11 is "to defer baseless filings in District Court . . . ", *Cooter, supra* at 2454, not to provide a loophole for the avoidance of sanctions upon the filing of a complaint filed with an improper purpose merely by delaying or failing to serve the named defendants. Petitioner's assertion further fails when applied to the language of other Federal Rules of Civil Procedure (i.e., Rule 5(a) which identifies defendants as "parties" prior to service).

Additionally, the award of sanctions has no relation to whom the sanctions will be paid. In *Peth v. Breitzman*, 611 F.Supp. 50 (E.D. Wis. 1985), the District Court awarded the attorneys' fees to a person not even named as a defendant, but whom the plaintiff had identified as one of the myriad of conspirators listed in the Tenth Amended Complaint.

It is apparent by now that the Court's power under Rule 11 is broad. Petitioner's argument that the District Court was erroneous in awarding sanctions directly to Respondents' respective counsel, as opposed to Respondents, is baseless. As shown in *Peth*, the Court has discretion to award sanctions to whomever it considers to have been violated. While Rule 11's primary purpose is not "wholesale fee shifting", it is instead a vehicle for the "correction of litigation abuse". *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 483 (3d Cir. 1987). Petitioner's counsel appears to be more concerned with what he perceives to be a windfall to Respondents' respective counsel than he is

with his own conduct. Both the District Court and the Eighth Circuit approved of the award of sanctions to Respondents' respective counsel; Petitioner's counsel's discomfort with that is not a sufficient basis for *certiorari* review.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit should be denied.

Respectfully submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

DORETHA BRYANT,	)	No. 89-0719-CV-W-8
Plaintiff,	)	(Filed May 15, 1990)
v.	)	
BROOKLYN BARBECUE CORP., et al.,	)	
Defendants.	)	

ORDER

On March 14, 1990 this court entered an order dismissing plaintiff's lawsuit for failure to serve the complaint in a timely manner. *See* Fed. R. Civ. P. 4(j). The court also granted defendants' motions for Fed. R. Civ. P. 11 sanctions, finding that plaintiff's attorney's admission that he did not conduct a complete factual investigation until after the complaint was filed constituted a violation of rule 11 and that his failure to even attempt service of the complaint within the 120 day period provided under Fed. R. Civ. P. 4(j) illustrated that the suit was filed for improper purposes. The court did not, however, enter an award of sanctions at that time as it wanted to give plaintiff's attorney an opportunity to respond to the fee affidavits submitted by defendants' attorneys in support of their motions for sanctions. This response has been received and, consequently, the remaining issues in the case are now ripe for decision.

Plaintiff initially argues that this court incorrectly assessed rule 11 sanctions because defendants, having never been served, may not properly be considered "parties" for purposes of rule 11. In support of this argument plaintiff cites two cases holding that an unserved defendant may not be considered a party for purposes of Fed. R. Civ. P. 54(b). *See e.g., United States v. Studivant*, 529 F.2d 673, 674, n.2 (3d Cir. 1976); *Ferguson v. Bartels Brewing Co.*, 284 F.2d 855, 857 (2d Cir. 1960). These cases are inapposite, however, since the purpose of rule 54(b), defining finality of judgment, differs dramatically from that of rule 11, preventing frivolous or harassing claims.

Although the parties were not able to find any cases directly on point, the court's research revealed one case with facts substantially similar to those presented here. *See Stinson v. American Sterilizer Co.*, 127 F.R.D. 689 (M.D. Ala. 1989). Plaintiff in *Stinson* first filed suit on November 23, 1988, believing that the Clerk of Court would perfect service through certified mail.[1] *Id.* at 691. Plaintiff's attorney did not inquire as to whether service had been made until April 6, 1989, 134 days after filing. At that time he learned that service had not been accomplished. *Id.* Shortly thereafter defendants filed a motion to dismiss and for rule 11 sanctions. After analyzing both the history and purpose of rule 11, the district court found that plaintiff's counsel's conduct was not reasonable and that sanctions were appropriate, even though defendants had not been served, since plaintiff's attorney "had no reason . . . to believe he had acted with due diligence or that

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[1] Apparently this was the practice in that district at the time.

he had 'good cause' for the delay in serving the complaint." *Id.* at 696.[2]

The facts of the instant case are even more egregious than those presented in *Stinson*. Unlike the attorney in *Stinson*, plaintiff's attorney in the instant case did not believe that anybody was attempting to serve defendants; he admitted that he filed the initial complaint to coincide with the sentencing of one of the defendants in an unrelated criminal matter and that he knew he had to conduct further inquiry before he could sufficiently plead the facts necessary to state a cause of action under the Racketeer Influenced and Corrupt Organizations (RICO) Act. Thus, the court reaffirms its earlier holding that the award of rule 11 sanctions in the instant case was appropriate.

Plaintiff argues that if sanctions are awarded, defendants should not receive the full amount of attorneys' fees billed by their attorneys because plaintiff could have voluntarily dismissed her complaint at any time prior to November 28, 1989 pursuant to Fed. R. Civ. P. 41(a).[3] This

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[2] The district court noted that it considered *Ordower v. Feldman*, 826 F.2d 1569 (7th Cir. 1987), in reaching this decision. The *Ordower* court held that rule 11 sanctions could properly be assessed against plaintiffs who did not serve defendants for more than 150 days after filing their complaint. This court relied on *Ordower* in its order finding that sanctions should be assessed against plaintiff's counsel.

[3] Rule 41(a) provides that a plaintiff may dismiss an action without leave of court "(i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs. . . ."

argument is without merit and ignores the realities of most federal court litigation. When a putative defendant reads in the newspaper that a plaintiff has filed a cause of action against him, as was the case here, the defendant must assume that the complaint was serious and will be served. Most defendants placed in such a position will take a course of action similar to that chosen by defendants Brooklyn Barbeque Corporation, William W. Rauschelbach, Sandra Rauschelbach, and Gary Berbiglia and begin to research possible defenses to the complaint so that they may promptly respond to the allegations once service has been accomplished. *See* Affidavit of Joe Coleman ("After the Defendants became aware of the filing of the Petition [sic] in this cause through the newspaper article that appeared in the Kansas City Star on July 29, 1989, the Defendants instructed the undersigned to immediately commence [sic] preparation of their defense in view of the type of allegations alleged against them. . . . "). Similarly, it is entirely reasonable for defendants to begin preparation of motions to dismiss when it appears likely that a complaint will not be served within the period allowed by Fed. R. Civ. P. 4(j).

The court has reviewed the affidavits submitted by counsel for defendants and finds that both the time spent and hours charged for the work related to the motions to dismiss and the motions for sanctions are reasonable. The court does not believe, however, that plaintiffs should be required to pay the legal fees incurred by defendants Brooklyn Barbeque Corporation, William Rauschelbauch, Sandra Rauschelbach, and Gary Berbiglia for research related to the substance of plaintiff's complaint. While this work was no doubt mandated by the filing of the

complaint, it was not merely an exercise in legal research skills and may still be used by defendants since plaintiff has refiled her lawsuit.[4] Although the court could require defendants' attorney to submit additional affidavits, separating the charges for the research relating to the substantive RICO issues from those incurred as a result of the motion to dismiss and the motion for sanctions, the court believes the more prudent course is to award sanctions based on the time charged by the *other* defendants' attorneys for similar work. Consequently, the court will assess sanctions against plaintiff's counsel[5] pursuant to Fed. R. Civ. P. 11 in the amount of $4,030.00 for fees incurred by defendant David R. Schlee, $5,000 for fees incurred by defendants Stockyards Preservation Co., Judith J. Kerr and Preston Kerr, and $5,000 for fees incurred by defendants Brooklyn Barbeque Corporation, William W. Rauschelbach, Sandra Rauschelbach and Gary Berbiglia.

As noted above, plaintiff refiled her lawsuit on March 16, 1990 as case number 90-0265-CV-W-8. Defendants have filed motions to stay all proceedings in the newly filed case until plaintiff's counsel has paid the sanctions assessed in this case. Fed. R. Civ. P. 41(d) provides that

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[4] A different result might be required if, for example, a statute of limitations problem prevented plaintiff from refiling the lawsuit.

[5] Defendants argue that sanctions should be assessed jointly against counsel and plaintiff. The court does not agree. Although plaintiff signed the complaint, there is nothing in the record that suggests that she was in any way involved with, or responsible for, her attorney's decision to file an admittedly insufficient complaint or the decision not to attempt service.

> [i]f a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

This rule applies to cases which are involuntarily dismissed as well as to cases which are voluntarily dismissed. *Zaegel v. Public Finance Co.*, 79 F.R.D. 58, 59 (E.D. Mo. 1978). *See also Hilgeford v. People's Bank, Portland Indiana*, 110 F.R.D. 700, 702 (N.D. Ind. 1986) (Rule 41(b), although it speaks in terms of "costs" and voluntary dismissal applies to both Rule 11 sanctions and to cases that are involuntarily dismissed). Because the court concludes that a stay order is appropriate in this situation, an order will be issued in case number 90-0265-CV-W-8, contemporaneously with this order, staying all proceedings in the newly filed case. Accordingly, it is

ORDERED that defendants' motions for rule 11 sanctions are granted. It is further

ORDERED that plaintiff's attorney pay the attorney of David R. Schlee $4030 as Rule 11 sanctions. It is further

ORDERED that plaintiff's attorney pay the attorney of defendants Stockyards Preservation Co., Judith J. Kerr and Preston Kerr $5000 as Rule 11 sanctions. It is further

ORDERED that plaintiff's attorney pay the attorneys of defendants Brooklyn Barbeque Corporation, William

W. Rauschelbach, Sandra Rauschelbach and Gary Berbiglia $5,000 as Rule 11 sanctions.

/s/ Joseph E. Stevens, Jr.
JOSEPH E. STEVENS, JR.
UNITED STATES
DISTRICT JUDGE

May 15, 1990

APPENDIX 2

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

DORETHA BRYANT,	)	CASE NO.
Plaintiff,	)	89-0719-CV-W-8
vs.	)	(Filed Dec. 13, 1989)
BROOKLYN BARBECUE CORPORATION, et. al.	)	

PLAINTIFF'S SUGGESTIONS IN OPPOSITION TO MOTIONS TO DISMISS; AND MOTION FOR LEAVE TO FILE AND SERVE FIRST AMENDED COMPLAINT.

COMES NOW the plaintiff, Doretha Bryant, by and through counsel, Larry Delano Coleman, P.C., and respectfully proffers to the Court herewith her suggestions in opposition to the motion of the defendants to dismiss. She also moves the Court for leave to file a first amended complaint, on or before December 26, 1989, and to serve same on or before January 26, 1989.

SUPPORTING SUGGESTIONS

1. This is landmark litigation.

2. It involves two of Kansas City's best known eating establishments: Arthur Bryant's Barbecue Restaurant, and the Golden Ox Steak house.

3. There is no question but that the complaint filed on July 28, 1989 has been been served. It has not been

served for very good reasons, which shall be illustrated below.

4. The first reason is the sheer massiveness of the factual predicates undergirding this RICO litigation. The complaint herein was filed to coincide with the sentencing of the brilliant, though malevolent, Preston Kerr, the principal owner of the Stock Yard Preservation Company, which owns the Golden Ox Restaurant; The Livestock Exchange Building and approximately 13 acres of parking spaces around The Kemper Arena. (See *U.S. v. Preston Kerr*, Case No. 88-00030-01-CR-W-3).

5. This same gentleman, Mr. Kerr, in a whirlwind, and through various entities formed by his agents, designees, employees and/or subordinates, acquired Arthur Bryant's Barbecue, from Ms. Doretha Bryant, the heir of the estate of the barbecue legend of that same name. The entities employed by him, jointly and severally in pursuit of his ends were and are: The Stock Yard Preservation Company, Arthur Bryant's Inc. and the Brooklyn Barbecue Corporation. Such, in simple language, is what this lawsuit is about: Mr. Kerr's acquisition and exploitation of the property of Doretha Bryant—*for nothing down*, and *for* nothing *since* in 1984, other than a few hundred dollars per month for rent from a Kerr-controlled entity Brooklyn Barbecue Corporation.

6. Upon information and belief, Arthur Bryant's Barbecue Restaurant presently grosses about $2,000,000 per year, and The Stock Yard Preservation Company presently grosses about $4,000,000 per year. Much is at stake.

7. In order to appreciate the enormous nature of the task at hand, this Honorable Court must know that

undersigned counsel had to study and intensively review the following mammoth files, practically *all* of which have been spawned in the enormous wake of Mr. Preston Kerr:

a. The Probate Estate of Arthur Bryant, case no. 139952 (Jackson County);

b. *Doretha Bryant v. Preston Kerr*, case no. CV84-18083 (Jackson County);

c. *Doretha Bryant v. Preston Kerr*, case no. WD 37906 (Mo.APP.);

d. *Linde Thomson Fairchild Langworthy Kohn & Van Dyke, P.C. v. Arthur Bryant's, Inc.*, case no. CV86-9508 (Jackson County);

e. *Brooklyn Barbecue Corporation v. Arthur Bryant's Inc., et al.*, case no CV86-17755 (Jackson County);

f. *Daniel J. Flanigan v. Preston Kerr, et al.*, case no. 85-0163-CV-W-9 (WDMO);

g. *Daniel J. Flanigan v. Preston Kerr, et al.*, case no. 86-1394 (8th Cir.);

h. *In re the Liquidation of Republic Bank*, case no. CV84-13021 (Jackson County);

i. *Arthur Bryant's, Inc. v. Federal Deposit Insurance Corporation and Republic Bank of Kansas City*, case no. CV86-9407 (Jackson County).

8. In addition, the closing documents evidencing certain licensing agreements and leasing agreements and escrow agreements, themselves, comprise over 1,000 pages, all of which had to be reviewed by undersigned counsel.

9. Further, in that the plaintiff has variously been represented by, and this case has passed through the

hands of, Linde Thomson Fairchild Langworthy Kohn & Van Dyke, P.C.; Gage and Tucker; Shughart Thompson Kilroy; Barbieri and Barbieri, and others, before coming to land on undersigned counsel's desk – all of which are preeminent law firms – this Court can further appreciate the enormity of undersigned counsel's task, since discovery documents, correspondence, and a legion of exhibits had to be reviewed and indexed. On the other side of the litigation the following preeminent firms have variously defended Preston Kerr or his interests, directly or indirectly: Shook Hardy and Bacon; Smith Gill Fischer and Butts; McDowell Rice and Smith; and Husch Eppenberger Donohue Cornfeld & Jenkins, among others. Getting to the bottom of this matter has been no mean task.

10. Lastly, undersigned counsel, himself, has been constrained to engage in litigation in the hope of obviating the need to pursue this RICO in the following cases, since August 1989:

a. *Doretha Bryant v. Brooklyn Barbecue Corporation*, case no CV89-25135 (Jackson County);

b. *Doretha Bryant v. Brooklyn Barbecue Corporation*, case no CV89-8997 (Jackson County);

c. *Brooklyn Barbecue Corporation v. Arthur Bryant's Inc., et al.*, case no CV86-17755 (Jackson County); (GARNISHMENT ACTIONS: against Mercantile Bank of Kansas City and against The Stock Yard Preservation Company);

d. *State of Missouri, ex re., DORETHA BRYANT, relator v. HONORABLE GENE R. MARTIN*, CASE NO. WD 42, 629 (Mo.App.), an abortive mandamus action.

11. In short, the RICO has not been served, because counsel intends to file a first amended complaint within two weeks of the filing date of this response, sufficient information having been gathered to plead with particularly the averments needed to establish anti-trust violations, securities fraud, common law fraud, Civil RICO, and other causes of actions against the named defendants and *other defendants*. It had not been served previously because of the colossal nature of the work needed, *in advance of the opening of discovery*, in order to successfully prosecute this extremely complex, and possibly multi-state litigation. Hence, leave is sought to file a first amended complaint, and to serve same on or before January 26, 1989.

12. Obviously, the defendants are anxious to get on with the instant litigation. Both the plaintiff and her counsel share their enthusiasm, and do not want to disappoint their reasonable expectations. To be sure, the defendants could have been served sooner; however, that would have necessitated several amendments to the complaint as more information became available. But, even though not served, how have the defendants been prejudice? They are still earning money off of the plaintiff's woes, and are financing their defense out of her loss. That they shall be served is *definite*, provided they do not secret themselves, which is a definite possibility. Indeed, they are hereby invited to enter their appearance, after December 26, 1989, if such would serve to assuage their ennui!

13. Undersigned counsel has shown good cause why these extremely complex litigation should not be

dismissed, and has requested relief, to put it on track, now that the necessary groundwork has been done.

14. Attached hereto is a complaint recently filed against Doretha Bryant in California by the wife of Preston Kerr, defendant Judith Kerr, and Hal Juergens, a business associate of Preston and Judith Kerr. Aspects of this litigation are referenced therein.

15. Again, this case is a landmark. It should be allowed to run its course. And does not warrant dismissal, since this plaintiff has not slept upon her rights, she has move with celerity to perfect them.

WHEREFORE, plaintiff prays that her motion be granted.

Larry Delano Coleman, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed this 12th day of DECEMBER 1989 to:

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